

**IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF OHIO  
EASTERN DIVISION**

**IN RE: NATIONAL PRESCRIPTION  
OPIATE LITIGATION**

This document relates to:

*All Cases*

MDL No. 2804

Hon. Judge Dan A. Polster

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**OPPOSITION TO PEC’S MOTION FOR LEAVE TO TAKE  
TRIAL PRESERVATION DEPOSITION OF DAVID KESSLER, M.D.**

The Plaintiffs’ Executive Committee (“PEC”) has sought leave to take a “trial preservation” deposition of plaintiffs’ manufacturer marketing expert, Dr. David Kessler. The PEC’s motion does not identify the testimony that it seeks to preserve, but Distributors<sup>1</sup> note that Dr. Kessler has never submitted a report under Rule 26(a)(4) or otherwise disclosed any expert opinions regarding Distributors. To the extent the PEC intends to use the proposed “trial preservation” deposition to obtain opinions regarding Distributors for the first time, its motion should be denied.

There is no case pending before this Court in which Dr. Kessler has been disclosed as an expert witness or has issued a written report as required under Rule 26. Dr. Kessler was identified as an expert in the already-concluded CT1 case, and likewise has been identified as an expert in opioid-related litigation pending in New York State. In both instances, however, Dr.

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<sup>1</sup> “Distributors” are AmerisourceBergen Drug Corp., Cardinal Health, Inc., and McKesson Corp.

Kessler made clear that he was not offering any opinions regarding Distributors. *See, e.g.*, Att. 1 (Feb. 25, 2019 MDL Tr.), at 94:20-21 (“I have no opinions on distributors.”); Att. 2 (Jan. 17, 2020 N.Y. Tr.), at 299:24-25 (I don’t have opinions on the distributors.”).

In light of the fact that Dr. Kessler has never disclosed any expert opinions regarding Distributors in any case, it would be unfair, inappropriate, and unduly prejudicial to allow him to do so for the first time in a “trial preservation deposition” untethered to any particular case.

### **CONCLUSION**

For the reasons given in the Manufacturer Defendants’ opposition (which Distributors incorporate herein by reference), the PEC’s motion should be denied. Alternatively, if the PEC is allowed to take a trial preservation deposition, Dr. Kessler should be precluded from offering expert testimony regarding Distributors during any such deposition and plaintiffs should be precluded from using any such testimony against Distributors in any future proceeding.

January 8, 2021

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that on January 8, 2021, the foregoing was served via the Court's ECF system to all counsel of record.

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